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No. 88-1215

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

PEGGY AULT,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., A California corporation; LARRY FLYNT, a citizen of California; FLYNT DISTRIBUTING COMPANY, INC., a California corporation; FLYNT SUBSCRIPTION COMPANY, INC., a Nevada corporation; L.F.P., INC., a California corporation; BAY NEWS, INC., dba Fred N. Bay News Company, an Oregon corporation; BAY NEWS INC., an Oregon corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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23 pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court overrule the consensus of all the federal circuit courts of appeal, and of this court itself, that statements of opinion are constitutionally protected from suit for libel or intentional infliction of emotional distress?

2. Should this Court overrule the consensus of the federal circuit courts of appeal that whether a statement is a statement of fact or a statement of opinion is a question of law for the court to determine?

3. Should this Court overrule the consensus of the federal circuit courts of appeal that the test for whether a statement is a statement of opinion or a statement of fact is based upon the totality of the circumstances with special emphasis given to context?

4. Should this Court accept Petitioner's invitation to "clarify or review" its unanimous, year-old decision in *Hustler Magazine, Inc. v. Falwell*, _ U.S. _, 108 S.Ct. 876 (1988)?

5. Should this Court review the specific statements published by Respondents about Petitioner to determine whether the United States Court of Appeals for the Ninth Circuit incorrectly concluded that those statements were constitutionally protected statements of opinion?

6. Should this Court review the United States Court of Appeals for the Ninth Circuit's determination, as a matter of Oregon state law, that a statement of critical editorial opinion by Respondents about Petitioner did not state claims of unlawful intrusion, misappropriation of image, or public disclosure of private facts?

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No. 88-1215

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PEGGY AULT,
Petitioner,

vs.

HUSTLER MAGAZINE, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents[1/] herein respectfully request that this Court deny the Petition for a Writ of Certiorari filed by Petitioner Peggy Ault to review the judgment and opinion

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1/ The corporate Respondents herein are affiliated with each other. There are no other corporate affiliations required to be reported under Rule 18.1.

of the United States Court of Appeals for the Ninth Circuit[2/].

I.
STATEMENT OF THE CASE

Like its companion petition in *Leidholdt v. L.F.P., Inc., et al.*, No. 88-1214, this case does not present any constitutional issue deserving review. The statements published in *Hustler*, and about which Petitioner complains, were admittedly, harsh and vituperative criticism of Petitioner's public activities and the ideas which she has publicly espoused in her battle against magazines such as *Hustler*. However, nothing in the editorial column could be construed as a false assertion of fact about Petitioner. Rather, as the courts below correctly concluded, the column consisted entirely of statements of constitutionally protected opinion.

Indeed, as is evident from the editorial itself and from the opinion of the court below, the statements complained of were made in the context of a response by *Hustler* to Petitioner's public attacks on *Hustler* and other magazines she considers to be pornographic. Having taken an active role in the debate on pornography, Petitioner's suit complained that *Hustler* had joined in the debate by condemning her and her views.

Petitioner actually concedes that in order to achieve the relief she seeks, it will be necessary for this Court to "clarify or review" (i.e. overrule) its unanimous, year-old decision in *Hustler Magazine, Inc. v. Falwell*, __ U.S. __, 108 S.Ct. 876 (1988). *See* Petition for Writ of Certiorari at 19. In *Falwell*, this Court held that whether a public figure claims libel or intentional infliction of emotional distress, he or she "may not recover . . . without showing in addition that the publication contains a false statement of fact which

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2/ This Brief in opposition is substantially identical to the Brief in opposition filed concurrently herewith by Respondents in the companion case of *Dorchen Leidholdt v. L.F.P., Inc., et al., No.88-1214*, just as Ault's Petition for a Writ of Certiorari is substantially identical to Leidholdt's. Essentially the only difference between the two Petitioners in these two cases is that Dorchen Leidholdt is an acknowledged public figure, while Petitioner Ault denies her public figure status.

was made with 'actual malice', i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true." 108 S.Ct. at 882. Petitioner has offered no reason whatsoever, let alone any compelling reason, for this Court to reverse itself on this crucial question of First Amendment law.

Petitioner's real but unstated complaint is simply that she does not believe that Hustler, a magazine that she has devoted much time and energy to fighting, should be able to mention her name in a vituperative, critical way. It is now firmly established, however, as a matter of constitutional law that vituperative, pejorative or pernicious opinion is not actionable; indeed, the opinion defense is constitutionally mandated and is now firmly established as the law of all of the federal circuits. Petitioner's attempts to persuade this court to abandon this bedrock of constitutional libel doctrine should be rejected.

Unlike her compatriot in the companion case of *Leidholdt v. L.F.P., Inc.*, Petitioner does not admit her public figure status. In fact, she minimizes her actual role as a leader in the public campaign against pornography. Although the Court of Appeals below did not deem it necessary to determine whether Petitioner is in fact a public figure, the District Court concluded that by her own pleadings Ault had proved herself to be a public figure, having voluntarily and intentionally injected herself into the public controversy over pornography. As a public figure, Petitioner failed to plead that Respondents published false statements of *fact* about her. Moreover, the requirement of a false statement of fact applies even to claims by private figures.

II.
REASONS FOR DENYING THE WRIT

1. The Opinion Defense Is Now Firmly Established As A Matter Of Federal Constitutional Law.

Incredibly, Petitioner seeks to turn the pages of history back to the time when the opinion defense had yet to be recognized as mandated by the First Amendment in libel cases. Petitioner appears to suggest that the various circuit courts, in a number of opinions in this area, have

misread precedent and overstated the protection afforded to opinion in libel cases.

There is simply no reason for this Court to acquiesce to Petitioner's desire to repeal this well-settled doctrine. "It is by now well-settled that there exists a constitutional privilege for expressions of opinion." *Matter of Yagman*, 796 F.2d 1165, 1172 (9th Cir. 1986), cert. denied, _ U.S. _ , 108 S.Ct. 450 (1987). "The constitutional distinction between fact and opinion is now firmly established in the case law of the circuits." *Potomac Valve and Fitting v. Crawford Fitting*, 829 F.2d 1280 (4th Cir. 1987).

Indeed, this Court has established the opinion defense in its various rulings regarding the well-recognized requirement of a false statement of fact in order for there to be actionable defamation. *See, e.g., Letter Carriers v. Austin*, 418 U.S. 264, 283-284 (1974) ("Before the test of reckless or knowing falsity can be met, there must be a false statement of fact."); *Hustler v. Falwell, supra*, 108 S.Ct. 876 (1988) (Public figures may recover for libel or defamation only when they can prove both that the challenged statement was false and that the statement was made with the requisite level of culpability.); see also, *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987) (Kennedy, J.) ("Statements not themselves factual . . . are commonly statements of opinion, not fact.").

The opinion defense has now been specifically embraced by all of the federal circuits. *See, e.g., Fudge v. Penthouse*, 840 F.2d 1012 (1st Cir.) *cert. denied*, _ S.Ct. 65 (1988); *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219 (2d Cir. 1985); *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987); *Potomac Valve and Fitting v. Crawford Fitting*, 829 F.2d 1280 (4th Cir. 1987); *Church of Scientology v. Cazares*, 630 F.2d 1272 (5th Cir. 1981); *Orr v. Argus Press Co.*, 586 F.2d 1108 (6th Cir. 1978) *cert. denied*, 440 U.S. 960 (1979); *Action Repair Inc. v. American Broadcasting Co.*, 776 F.2d 143 (7th Cir. 1985); *Janklow v. Newsweek*, 788 F.2d 1300 (8th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 883, 107 S.Ct. 272 (1986); *Koch v. Goldway, supra*, 817 F.2d 507 (9th Cir. 1987); *Rinsley v. Brandt*, 700 F.2d 1304 (10th Cir. 1983); *Keller v. Miami Herald Pub. Co.*,

778 F.2d 711 (11th Cir. 1985); *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1127 (1985).

Petitioner asks this Court to believe that each of the federal circuits' recognition of the opinion defense is based upon an unwarranted, even erroneous misreading of the "dicta" of *Gertz v. Robert Welch*, Inc., 418 U.S. 323 (1974) that "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for it correction no on the conscience of there is no such thing as a false idea" and that judges and juries are not to pass judgment on expressions of opinion. *Id.* at 339. However, statements of opinion have evolved into protected speech quite simply because, as noted by this Court in *Gertz*, an opinion simply cannot be false and actionable defamation requires the utterance of a false statement of fact. "Since an opinion is protected because it cannot be false and a statement is not actionable defamation unless it is false, 'an opinion is simply not actionable defamation.'" *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983) (citing Restatement (2d) of Torts, Section 558(a) (1977).

Moreover, Petitioner's attempt to distinguish *Hustler v. Falwell, supra*, on the ground that the *Falwell* case came to this Court along with a jury finding that there had been no statement of fact uttered about Reverend Falwell is unavailing. The determination of whether a challenged statement is one of fact or of opinion is a question of law for the court. *Matter of Yagman, 796 F.2d 1165, 1172 (9th Cir. 1986); Lewis v. Time, Inc., 710 F.2d 549, 553 (9th Cir. 1983); Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983); Orr v. Argus Press Co., 586 F.2d 1108, 1114 (6th Cir.), cert. denied, 440 U.S. 960 (1979); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985); see Letter Carriers v. Austin*, 418 U.S. 264 (1974) *(Reversing judgment because, as a matter of federal law, no factual representations could be inferred from challenged statements).* The fact that the district court in *Falwell* erroneously permitted the opinion defense to go to the jury does not mean that this Court's opinion in *Falwell* endorsed such a departure from the traditional constitutional roles of judges in determining whether a statement is opinion.

Petitioner also suggests (although apparently not very strongly) that because she does not admit her public figure status, she is not bound by the strictures against recovery based upon statements of opinion. The court of appeals, relying on its own precedent, correctly observed that the opinion privilege bars actions brought by private figures as well as public figures. The fact is that no court has held that the opinion privilege applies only to private figures, and the opinion privilege has frequently been successfully invoked against private figures. *See, e.g., Deupree v. Iliff*, 860 F.2d 300, 304-305 (8th Cir. 1988); *Ollman v. Evans, supra*, 750 F.2d at 975. *See also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)(private figure plaintiff must prove that false statements were made when statements relate to matters of public concern). Moreover, Ault's admitted leadership role in the public controversy over pornography clearly qualifies her for public figure status, as the district court correctly concluded.

2. Vituperation Is Not Defamation.

Petitioner asks this Court to view the statements complained of in this case as unprotected opinion without regard to the truth or falsity of the statements, but rather because they are vituperative and "pornographic", in the words of Petitioner. Such a view is neither warranted by the overriding First Amendment concerns which mandate the opinion defense nor by the facts of this case.

As a matter of constitutional law, vituperative, pejorative or pernicious opinion is not actionable. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 329 (1974), this Court stated:

> "Under the First Amendment there is no such thing as a false idea. *However pernicious an opinion may seem*, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (Emphasis added.)

Indeed, as a longstanding matter of law, vituperation and insulting words have not been actionable. Rather, they have long been recognized as protected "rhetorical hyperbole." *See, e.g., Letter Carriers v. Austin*, 418 U.S. 264, (1974) ("scab", "traitor"); *Greenbelt Cooperative*

Publishing Association v. Bresler, 398 U.S. 6 (1970) ("blackmail"). *See also, Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966) ("bastard").

Petitioner's contention that *Letter Carriers* was a labor law decision with no precedent of value in the First Amendment context overlooks the fact that "the case explicitly applied First Amendment principles." *Dworkin v. Hustler Magazine, Inc.*, _F.2d _, 1989, WL 3925, 1989 U.S. App. Lexis 565, slip op. at 537 n.4 (9th Cir. Jan.24, 1989).

As Dean Prosser has stated, "A certain amount of vulgar name calling is tolerated, on the theory that it will necessarily be understood to amount to nothing more." W. Prosser & W. Keeton, *Handbook of the Law of Torts*, § 111, at 776 (5th Ed. 1984).

Most recently, this Court elaborated the protections which the First Amendment requires be given in cases such as this. *Hustler Magazine, Inc. v. Falwell*, _ U.S. _, 108 S.Ct. 876 (1988). In *Falwell*, the Court reaffirmed that it is immaterial whether a publication about a public figure is made with a bad motive or ill will, or that the publication is "outrageous" or offensive. The Court accepted the fact that the publication in question was "offensive to [Falwell], and doubtless gross and repugnant in the eyes of most." 108 S.Ct. at 879. But this Court rejected a rule which would permit recovery "for speech that is patently offensive and is intended to inflict emotional injury even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved." *Id.*

Such a rule was rejected because it would interfere with "the heart of the First Amendment" - "the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern" and "the freedom to speak one's mind." *Id.*

This Court noted that the sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of public figures. *Id.*

> "Justice Frankfurter put it succinctly in *Baumgartner v. United States*, 322 U.S. 665, 673 - 674 (1944), when he said that 'one of the prerogatives of American citizenship is the right to criticize public men and measures.' Such

> criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks.' *New York Times, supra,* 376 U.S., at 270."

108 S.Ct. at 880.

Petitioner's attempt to cast the words used against her as statements which are "beyond the pale" ignores the longstanding and well-reasoned authority that caustic and vehement criticism is the price public figures must pay for their public figure status. Thus, even though the editorial in this case was likely offensive to Petitioner and perhaps even "gross and repugnant in the eyes of most", *Falwell, supra,* it is not unprotected opinion simply because it is vituperative and most it certainly does not justify this Court's reexamining and limiting the opinion defense.

3. There Is No Conflict Between The Circuits With Respect To The Fact/Opinion Test.

Petitioner asserts that there exists a conflict between the Ninth Circuit's test for determining whether a challenged statement is one of fact or of opinion and the tests employed by other circuits. In reality, however, any differences in the tests enunciated by these circuits amounts to nothing more than a difference in the words chosen to articulate the tests; indeed, both tests have as their common and most important denominator an analysis of the "totality of the circumstances" of the challenged statements with an emphasis on the context of the statements themselves.

Curiously, Petitioner asserts that the court below erred in applying its own test, rather than that of the Second Circuit, in determining whether the statements in this case were statements of fact or of opinion. Petitioner erroneously believes that choice of law principles require one federal circuit court of appeals to eschew its doctrine of when the plaintiff is a resident of the other circuit. Even if Petitioners were correct, however, the result would be the same because the tests for opinion are essentially identical in the Second and Ninth Circuits. The Court below applied the three-pronged test which it had first applied in *Information Control v. Genesis One Computer Corp.*, 611

F.2d 781 (9th Cir. 1980). Appendix A-6.[3/] That test requires examination of the language used, the context (i.e., the facts surrounding the publication), and whether the statement was made in circumstances in which the audience would anticipate efforts by the parties to persuade others to their position by use of epithets or hyperbole. *Information Control*, 611 F.2d at 783-784, *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983).

Petitioner concedes that the test enunciated by the Second Circuit in *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 739 F.2d 219 (2nd Cir. 1985), like the Ninth Circuit test, places great emphasis on the context in which the challenged statements are made and the circumstances surrounding the making of those statements; however, she argues that the Second Circuit test is in conflict with the Ninth Circuit because it contains a separate analysis concerning whether or not the statements are objectively capable of being proved true or false.

The inclusion of this "verifiability" prong does not set the respective tests in conflict with one another; indeed, both tests require, as their dominant feature, an analysis of the context of the statements and the surrounding circumstances of publication. In particular, the Second Circuit test enunciated in *Mr. Chow* was adopted from the four part test enunciated by the D.C. Circuit in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1127 (1985). See *Mr. Chow*, *supra*, 759 F.2d at 226. *Ollman* noted, however, that none of the four factors was paramount, particularly that of verifiability. On the contrary, *Ollman* emphasized the context in which the statements appear and the language surrounding the challenged statements.

> "We do not, of course, suggest that the four factor analysis is to be undertaken in a rigid locked-step fashion. Thus, as will become evident below, a logical starting point in applying the fact-opinion analysis may be the broad social context or setting within which the defamatory statement appears (factor "four")

3/ References to the Appendix noted herein are references to the specific pages of the Appendix to the Petition for Writ of Certiorari.

> and the language surrounding the challenged statements (factor "three").

Ollman, supra, 750 F.2d at 980, footnote 17.

Indeed, *Ollman* cited approvingly to the Ninth Circuit test of *Information Control,* noting that:

> "The degree to which a statement is 'laden with factual content' or can be read to imply facts depends upon the article or column, taken as a whole, from which the statement is a part. [Citation omitted.] The language of the entire column may signal that a specific statement which, standing alone, would appear to be factual is in actuality a statement of opinion."

750 F.2d at 982.

Moreover, the Fourth Circuit Court of Appeals, which has adopted the *Ollman* four-prong test, has dismissed the verifiability prong which Petitioner contends creates a conflict in the respective tests when the other prongs of the test demonstrate that a challenged statement is one of opinion.

> "Even when a statement is subject to verification, however, it may still be protected if it can best be understood from its language and context to represent the personal view of the author or speaker who made it. [Footnote omitted.] Thus we reject the suggestion, advanced by the plaintiffs in this case, that any 'question of fact' which can be decided by a jury can be actionable as defamation. Such a test ignores the underlying purposes of the fact/opinion distinction, and would lead to results that could not be reconciled with the developing case law in other circuits." [Footnote omitted.]

Potomac Valve and Fitting v. Crawford Fitting, supra, 829 F.2d 1288. The *Potomac Valve* court went on to note:

> "We hold that a verifiable statement, a statement that has failed the second *Ollman* factor, nevertheless qualifies as an 'opinion' if it is clear from *any* of the three remaining *Ollman*

> factors, individually or in conjunction, that a reasonable reader or listener would recognize its weakly or substantiated or subjective character - and discount it accordingly." (Emphasis in original.)

Id.

This is precisely what the court below has done in this case. In examining the context of the entire editorial column, the court noted:

> ". . . Hustler is a magazine known for its pornographic content and is directed to an audience sympathetic to pornography, and that the 'Asshole of the Month' column is an especially frequent vehicle for Hustler's lampooning of its critics, all will telegraph to a reader that the article presents opinions, not allegations of fact."

Appendix A-7. The court went on to note that:

> "While Hustler's remarks were not uttered in a live public debate, it nevertheless is an active participant in an ongoing, heated debate on the subject. Readers of the article, recognizing that it concerns a public, vigorous opponent of pornography, will read Hustler's vituperation as exaggerated criticism of the views she holds."

Appendix A-8.

Indeed, a great majority of cases from the various circuits concerning the opinion defense base their analysis, in large part, on the "context" analysis of the challenged statements themselves as well as the "totality of the circumstances" surrounding publication which, as Petitioner concedes, are features common to both the Ninth and Second Circuit tests. See, e.g., *Koch v. Goldway*, 817 F.2d 507 (9th Cir. 1987); *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984); *Janklow v. Newsweek*, 788 F.2d 1300; *cert. denied*, 479 U.S. 883, 107 S.Ct. 272 (1986); *Keller v. Miami Herald*, 778 F.2d 711 (11th Cir. 1985); *Potomac Valve and Fitting v. Crawford Fitting, supra*, 829 F.2d 1280 (4th Cir. 1987).

Petitioner is therefore simply incorrect in arguing that if a statement appears objectively verifiable that statement must automatically be viewed as fact and not opinion. Even apparent factual statements must be allowed as opinion "when the surrounding circumstances of a statement are those of a heated political debate, or if certain remarks are necessarily understood as ridicule or vituperation, or both, but not as descriptive of factual matters." *Koch v. Goldway, supra*, 817 F.2d at 509. *See also, Janklow v. Newsweek, Inc., supra*, 788 F.2d 1300, 1302 (8th Cir. 1986).

Moreover, Petitioner's plea that certain of the statements made in the editorial are objectively verifiable is simply unavailing. Viewing the statements in context, as the court below correctly did, it is clear that Hustler was simply expressing its opinion that the kind of individuals who engage in the anti-pornography campaign and believe that "pornography" leads to rape and violence against women hold unfounded beliefs and are the type of women who are not liberated in the manner that Hustler advocates. In fact, it is precisely the point of *Gertz* that just as there is no such thing as a false idea, the judicial process is not available for proving whether one person's ideas are "founded" or "unfounded." Such disputes are to be resolved in the marketplace of ideas, not in the courts.

The statements which Petitioner contends are "verifiable" in this case all relate to Respondents' characterizations of Petitioner's belief and subjective state of mind. Such opinions are hardly verifiable, any more than the motives of a state prosecutor are verifiable. *See Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986); *Deupree v. Iliff*, 860 F.2d 300, 303-304 (8th Cir. 1988) (plaintiff's intrinsic, personal satisfaction in her job is not verifiable). Characterizations of one's state of mind are inherently unverifiable, depending as they must on the subject's own self-serving assertions as to what he or she actually believes or feels. Otherwise, a libel plaintiff could always defeat the opinion defense simply by asserting that the defendant's characterization of his or her beliefs is inaccurate, and that the only person who truly knows the plaintiff's beliefs is the plaintiff himself or herself.

Thus, while Petitioner would understandably like to construct some reviewable conflict between the circuits in the application of the opinion defense, the truth is that the circuits apply a uniform analysis in the determination of whether statements are fact or opinion and any differences are limited largely to the way in which that analysis is articulated. In this case, the court below applied the appropriate test and correctly concluded that the challenged statements were constitutionally protected opinion.

4. Petitioner's Claims of Invasion of Privacy Present No Constitutional Issue Worthy Of Review.

Petitioner asks this Court to review the decision of the court of appeals in dismissing her state law tort claims based upon three variants of invasion of privacy: misappropriation of image, intrusion and public disclosure of private facts. Petitioner's complaint is not of constitutional magnitude, nor does it present any federal question whatsoever. Rather, Petitioner simply contends that the court erroneously interpreted Oregon law and its own Ninth Circuit precedent.

Respondents submit that even if the these issues were worthy of consideration by this Court, the opinion of the court of appeals on these issues was correctly reasoned.

III.
RESPONDENTS SHOULD BE AWARDED DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

Not only should the Court deny the petition for a writ of certiorari, but it should also award Respondents damages pursuant to Rule 49.2 of the rules of this Court. Rule 49.2 provides:

> When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

This Court has not hesitated to impose such damages on Petitioners filing frivolous petitions for certiorari in appropriate cases. *See Hatch v. Reliance Insurance Co.*, 474 U.S. 1048 (1986); *Hyde v. Van Wormer*, 474 U.S. 992 (1985); *Tatum v. Regents of University of Nebraska*, 462 U.S. 1117 (1983).

The petition for a writ of certiorari in this case clearly qualifies as frivolous. In order to prevail, Petitioner must persuade this Court to overturn its unanimous, one year old decision in *Hustler Magazine, Inc. v. Falwell*, and in fact Petitioners ask this Court to do so. See Petition for Writ of Certiorari at 19, where Petitioner seeks "clarification or a review of the result in *Falwell, supra*."

Moreover, in order to prevail Petitioner must persuade this Court to reject the well-established protection, mandated by the First Amendment, granted to statements of opinion.

This is one of five similar lawsuits filed by the same attorneys on behalf of Petitioner and fellow anti-pornography activists against *Hustler* Magazine. The trial courts have dismissed each of these cases, either for failure to state a claim upon which relief can be granted or on a motion for summary judgment. *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890 (9th Cir. 1988); *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877 (9th Cir. 1988); *Dworkin v. Hustler Magazine, Inc.*, __ F.2d __, 1989 WL 3925, 1989 U.S. App. Lexis 565, (9th Cir., Jan. 24. 1989); *Spence v. Flynt*, slip op., Wyoming District Court, Eighth Judicial District, November 21, 1988; *Dworkin v. L.F.P., Inc.*, slip op., Wyoming District Court, Eighth Judicial District, November 21, 1988.

In *Dworkin v. Hustler Magazine, Inc.*, the Ninth Circuit served notice on plaintiffs such as Petitioner that in the future, sanctions may be appropriate when claims such as Petitioner's are pressed. Slip op. at 550. Respondents respectfully submit that this Court should serve notice on Petitioner and her attorneys, through an award pursuant to Rule 49.2, that such frivolous litigation will not be tolerated.

IV.
CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: February 23, 1989

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on February 23, 1989, I served the within *Respondents' Opposition Brief to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

G.L. Spence
Gary L. Shockey
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Jackson, Wyoming 83001
(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 23, 1989, at Los Angeles, California.

Claude A. Lagardere
(Original signed)